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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

NEW YORK MARINE AND
GENERAL INSURANCE COMPANY,
a New York corporation,

Plaintiff,

v.

AMBER HEARD, an individual,

Defendant.

AMBER HEARD, an individual

Counter-claimant

v.

NEW YORK MARINE AND
GENERAL INSURANCE
COMPANY, a New York corporation,

Counter-defendant

Case No. 2:22-cv-04685-GW(PDx)

[PROPOSED] ORDER

Date: March 13, 2023
Time: 8:30 a.m.
Judge: Hon. George H. Wu
Courtroom: 9D

Filed Concurrently with Notice of
Motion and Motion; Memorandum of
Points and Authorities; Request for
Judicial Notice, Declaration of James P.
Wagoner, Proposed Order

Complaint Filed July 8, 2022
FAC Filed July 11, 2022

1 On March 13, 2023, Plaintiff and Counter-Defendant New York Marine and
 2 General Insurance Company's ("NY Marine") Motion To (1) Dismiss Heard's
 3 Counterclaim Pursuant to Rule 12(b)(6), or (2) Alternatively, for A More Definite
 4 Statement Pursuant to Rule 12(e), And (3) to Strike Certain Allegations Pursuant to
 5 Rule 12(f), was heard in Courtroom 9D of the United States District Court for the
 6 Central District of California before the Honorable George H. Wu.

7 NY Marine has filed a Request for Judicial Notice of certain documents,
 8 including a Reservation of Rights Letter and certain other documents reflecting the
 9 status and relationship of the parties. The Court finds that there is a basis for granting
 10 said request and does so. *See Sams v. Yahoo! Inc.*, 713 F.3d 1175, 1179 (9th Cir.).

11 NY Marine has also requested that the Court consider certain documents,
 12 specifically the Reservation of Rights Letter, pursuant to the "incorporation by
 13 reference" doctrine, pursuant to which where "claims are predicated on a document,
 14 the defendant may attach the document to his 12(b)(6) motion." *Parrino v. FHP, Inc.*,
 15 146 F.3d 699, 706 (9th Cir. 1998). Accordingly, the Court finds that there is also a basis
 16 for granting said request and does so.

17 Having read and considered NY Marine's Motion to Dismiss, all other papers,
 18 and oral argument thereon, the Court concludes that Defendant and Counterclaimant
 19 Amber Heard ("Heard") has failed to state a claim upon which relief can be granted
 20 in that her allegations, together with both facts of which judicial notice has been taken
 21 and facts set forth in pleadings and letters referred to in the Complaint or upon which
 22 her claims are based which have been considered by the Court pursuant to the Request
 23 for Judicial Notice and under the "incorporation by reference" doctrine, fail to
 24 demonstrate that NY Marine either owed a duty to provide independent counsel
 25 pursuant to Civil Code § 2860 to Ms. Heard, or breached its duty to defend her by
 26 refusing to provide her with independent counsel.

27 Specifically, the pleadings, evidence and argument demonstrate that under
 28 Virginia law, insurer-appointed defense counsel represents only the insured. *Norman*

1 *v. Ins. Co. of N. Am.*, 218 Va. 718, 722, 727-728 (1978). As a result, no conflict could
 2 arise between appointed counsel and Ms. Heard so as to require the appointment of
 3 independent counsel under Civil Code § 2860.

4 Separately, the Reservation of Rights Letter issued to Ms. Heard by NY Marine
 5 was a “general” reservation of rights letter which also did not give rise to any conflict
 6 of interest requiring the appointment of independent counsel. *Centex Homes v. St.*
 7 *Paul Fire & Marine Ins. Co.*, 237 Cal.App.4th 23, 31 (2015); *Federal Ins. Co. v. MBL,*
 8 *Inc.*, 219 Cal.App.4th 29, 42 (2013).

9 The pleadings, evidence and argument therefore demonstrate that in failing or
 10 refusing to “fully accept” the defense provided by NY Marine through appointed
 11 defense counsel, NY Marine’s obligations to defend or indemnify her under the
 12 policy, including by reimbursing any defense fees consequently incurred by her, were
 13 excused.

14 The Counterclaim fails to allege that any costs or fees incurred by Ms. Heard
 15 were incurred at the “request” of NY Marine as required by the NY Marine policy to
 16 be covered. The pleadings, evidence and argument further demonstrate that in failing
 17 or refusing to “fully accept” the defense provided by NY Marine, Ms. Heard breached
 18 her duties and obligations under the policy issued by NY Marine, including the terms
 19 of the policy’s “no voluntary payments” provision. Accordingly, the Court finds that
 20 any defenses costs incurred or paid by Ms. Heard were incurred by her voluntarily.

21 Additionally, the allegations set forth in the Counterclaim establish that a
 22 defense was provided to her, through independent counsel, by another insurer,
 23 Travelers Commercial Insurance Company. (Counterclaim ¶ 26.) An insured is “only
 24 entitled to one full defense.” *Safeco Ins. Co. of Am. v. Parks*, 170 Cal.App.4th 992,
 25 1004 (2009); *Clarendon Nat’l Ins. Co. v. Nat’l Fire and Marine Ins. Co.*, 512 Fed.
 26 Appx. 671, 673 (9th Cir. 2013). Furthermore, the hourly “rate limit” of Civil Code
 27 §2860(c), which limits the defending insurer’s obligation to pay “the rates which are
 28 actually paid by the insurer to attorneys retained by it in the ordinary course of

1 business in the defense of similar actions in the community”, “provides a single rate
 2 limitation, for a single counsel and defense, albeit multiple insurers may be required
 3 to contribute to its payment.” *San Gabriel Valley Water Co. v. Hartford Acc. & Indem.*
 4 *Co.*, 82 Cal.App.4th 1230, 1241 (2000); *see also, M.B.L., Inc. v. Fed. Ins. Co.*, 675
 5 Fed.Appx. 731, 734 (9th Cir. 2017); *MGA Ent’mt, Inc. v. Hartford Ins. Co. of the*
 6 *Midwest*, EDCV 09-00025 DOC (OPx), 2010 WL 11468788 *8 (C.D.Cal. Feb. 10,
 7 2010). As a consequence, the allegation is fatal to Ms. Heard’s claims, as the defense
 8 provided by Travelers Commercial Insurance Company precludes her from stating
 9 any claim against NY Marine arising out of its alleged failure to provide her with a
 10 defense in the action in which she was provided with a defense by another insurer.

11 The pleadings, relevant evidence and argument thus fail to show that Ms. Heard
 12 may state any viable claims for relief against NY Marine, including those for breach
 13 of contract and breach of the implied covenant of good faith and fair dealing (“bad
 14 faith”), predicated either upon NY Marine’s refusal to pay her expenses or to provide
 15 her with a defense through independent counsel of her own choosing, or upon its
 16 failure to reimburse her or others for costs incurred by her to defend herself, whether
 17 through separate counsel, or for amounts over and above those paid to independent
 18 counsel by her defending insurer, Travelers Commercial Insurance Company,
 19 pursuant to Civil Code § 2860(c).

20 NY Marine’s motion is accordingly **GRANTED**, and the Counterclaim is
 21 **ORDERED DISMISSED, WITH PREJUDICE.**

22 **IT IS SO ORDERED**

23
 24 This ___ day of February 2023

25
 26 _____
 27 Hon. George H. Wu

28 8910536.1

PROOF OF SERVICE

New York Marine and General Insurance Company v. Amber Heard
USDC Central District Case No. 2:22-cv-04685-GW-PD

STATE OF CALIFORNIA, COUNTY OF FRESNO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Fresno, State of California. My business address is 7647 North Fresno Street, Fresno, CA 93720.

On February 10, 2023, I served true copies of the following document(s) described as **[PROPOSED] ORDER** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on February 10, 2023, at Fresno, California.

/s/ Marisela Taylor

Marisela Taylor

SERVICE LIST

New York Marine and General Insurance Company v. Amber Heard
USDC Central District Case No. 2:22-cv-04685-GW-PD

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Courtesy Copy – Via Email

*Attorneys for Plaintiff and
Counterclaimant Travelers Commercial
Insurance Company in USDC Central
District Case No. 2:21-cv-05832-GW,
consolidated for pre-trial purposes*